SUMMARY of COOPERATIVE CASES

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UNITED STATES DEPARTMENT OF AGRICULTURE
FARMER COOPERATIVE SERVICE

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CONSTRUCTION OF BYLAW PROVISION ALLOWING DIRECTORS WIDE DISCRETION IN SELECTING STOCK FOR RETIREMENT

(Grey Eagle Cooperative v. Todd County Dairy Cooperative
D. Ct., 7th Dist., Todd County, Minnesota, Case No. 13,292,
October 30, 1961)

A bylaw is "lawful and valid", which authorizes the directors of a cooperative to call "Any and all shares of capital stock . . ., either for repurchase or for retirement, as the Board of Directors may determine, at any time upon (1) call of the Board of Directors . . . ." Such power must not be exercised for the purpose of "arbitrarily discriminating against a single shareholder or a particular group of shareholders or for purposes of reprisal, spite or other improper motives which constitute bad faith on the part of the directors." However, the evidence in this case was held not to justify such a finding, and, accordingly, an intentional omission of one stockholder for reasons described below was held lawful in this case.

From 1944 until April 15, 1960, the plaintiff, a local association of dairy farmers, was a member of the defendant organization, a federated association of local cooperative creamery associations. The plaintiff was a patron of the defendant association from 1944 until June 30, 1959, and from that time it did not deliver any milk to the defendant association or otherwise patronize it.

The bylaws of the defendant association required it to distribute to its patrons each year the net margins resulting from its business operations, but it was authorized to make such payments in preferred stock. In 1946 and 1947, the defendant issued to its patrons, including the plaintiff, shares of preferred stock in payment of net margins. The 1947 payment, hereinafter referred to as "1946 shares", was for the year ending 1946, and the plaintiff was issued 26,714 shares of preferred stock for that year.

In 1955, the defendant repurchased 23,368 of the "1946 shares" including 2,304 shares of the 26,714 held by the plaintiff. In 1959, the defendant repurchased 80,000 of said "1946 shares", including 7,886 shares held by the plaintiff. Subsequently, the defendant issued to the plaintiff preferred stock certificate No. 283 for the plaintiff's remaining 16,524 "1946 shares", on the reverse side of which was printed Subsection e of Section 2 of Article V of the defendant's Articles of Incorporation which provided as follows:

"Any and all shares of capital stock may be called,either for repurchase or for retirement, as the Board of Directors may determine, at any time upon (1) call by the Board of Directors, ..."

In March 1960, the defendant repurchased 72,115 of said "1946 shares" held by 12 holders of such preferred stock other than the plaintiff. Of those shares, 69,073 were purchased from 10 holders, (representing about 47.7% of said "1946 shares" held by each such holder) 3,031 were purchased from the eleventh holder, (representing about 33.5% of said "1946 shares" held by such holder), and all eleven shares held by the twelfth holder were purchased from him.

Although the court held that the bylaw provision in question was valid, it stated that the discretion vested in the board thereunder could not be exercised for the purpose of "arbitrarily discriminating against a single stockholder or a particular group of shareholders or for purposes of reprisal, spite or other improper motives which constitute bad faith on the part of the directors". The court observed that for the year ending October 31, 1959, the defendant did not call any preferred stock for redemption because its cash position was relatively low at that time, but that subsequently when it decided to borrow money in order to purchase buttermaking equipment, the Board of Directors deemed it advisable to borrow enough additional cash to enable it to redeem some preferred stock. However, the Board decided that it would not be a good business policy to borrow cash to pay over to the plaintiff because it has ceased to patronize the defendant and would not thereafter furnish patronage which would enable the defendant to earn the cash which would be necessary to repay its loan. Consequently, it omitted plaintiff's "1946 shares" from the list of shares to be recalled for purchase in 1960. The court also observed that for many years prior to March 9, 1960, the defendant's Board of Directors construed the bylaw provision in question to confer upon it the authority to select which shares of which class of stock it would call for repurchase and it repeatedly exercised that authority and never called for repurchase any uniform percentage of all outstanding shares of either class of defendant's capital stock held by all its shareholders.

Although the court held that the evidence did not justify a finding that the defendant's Board of Directors acted in bad faith or arbitrarily or unfairly or oppressively under the circumstances in exercising their discretion under the cited bylaw provision, it said in concluding its opinion:

"If the defendant's board, in the future and when the defendant's cash position is improved, should again by-pass only the plaintiff when calling for repurchase other shares of preferred stock which other shareholders

received at the same time and under the same circumstances as plaintiff received its shares, such action could be construed as showing bad faith and an abuse of power."

# # #

MEMORANDUM DECISIONS OF THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT FOLLOWING THAT COURT'S DECISION IN THE POMEROY CASE.

A number of Tax Court cases following the Tax Court's decision in Pomeroy Cooperative Grain Co. v. Commissioner, 31 T.C.674, (See Legal Series No. 8, March 1959) were reported in Legal Series No. 8, p. 7 and Legal Series No. 10, p. 43. These cases, which are set forth below have been disposed of on appeal before the United States Court of Appeals, Eighth Circuit, June 19, 1961, pursuant to stipulation to abide by that Court's decision in the Pomeroy case which affirmed in part and reversed and remanded in part the Tax Court's decision in that instance. (See the Court of Appeals decision as summarized in Legal Series No. 18, June 1961, p. 17).

Bradgate Cooperative Exchange; Minburn Cooperative Elevator; Farmers Cooperative Elevator Co.; Alleman Cooperative Company; Alta Cooperative Elevator; Superior Cooperative Elevator Co.; Lone Rock Cooperative Exchange; Farmers Cooperative Elevator (2 cases); and Farmers Cooperative Co. (291 F. 2d - 753 (1961))

# # #

BANKRUPTCY - DISTRIBUTION OF NET GAINS OF BANKRUPT UNDER PRICE SUPPORT TOBACCO LOAN AGREEMENTS

(In the Matter of Tennessee Burley Tobacco Growers' Association-Bankrupt - U. S. Dist. Ct. for the Eastern District of Tennessee, Northeastern Div. No. 6045)

Memorandum Opinion of the Referee in Bankruptcy

This opinion was filed on the Commodity Credit Corporation's petition to specific performance by distribution in cash to tobacco growers for net gains accrued by the Tennessee Burley Tobacco Growers' Association under price support Tobacco Loan Agreements for the crop years 1947-1950. The Referee ruled that he was bound by the decisions of the Tennessee State Courts in the case of Range v. T.B.T.G.A., 298 SW 2d. 543, and Neas v. T.B.T.G.A., 331 SW 2d. 302 (certiorari was denied by the U.S. Supreme Court in the Range case) holding that the net gains provisions of the Tobacco Loan Agreements required a distribution in cash to growers of the net gains resulting from sales of loan tobacco and that the C.C.C. had not approved any other disposition of such net gains.

The U. S. District Court had previously reversed an order of the Referee denying C.C.C's petition on a motion for summary judgment filed by the Trustee in Bankruptcy. The Refereee held that, after considering the evidence adduced at the hearing, specific performance - limited to those persons who identify themselves - must be ordered in accordance with the plan outlined by the District Court.

The Referee asserted that the State courts in the Range and Neas cases did not, however, determine how much of the amount owed each claimant was derived from the net gains from the sale of tobacco and that it was for the Referee in this opinion to determine the amounts due growers under the net gains provisions of the contracts.

C.C.C. contended that under the terms of the Tobacco Loan Agreements it had the right to direct distribution in cash or in any other manner approved by it of all profits derived by the Bankrupt, regardless of the source thereof. The Referee held, however, that income derived by the Bankrupt from other sources was not controlled by the net gains provision of the Tobacco Loan Agreements and that

the term "net gains" covered only the net gains derived from the sale of tobacco upon which C.C.C. loaned funds under the Tobacco Loan Agreements. The Referee thus rejected C.C.C.'s contention that the net gains for the years 1947-1950 amounted to $450,983.03.

The Bankrupt contended that the maximum amount to be paid growers for those years was $44,000 and that losses for the 1947 and 1950 crop years as well as certain overhead expenses advanced by the Bankrupt for the 1951-1955 crop years should be set off against net gains for the 1948 and 1949 crop years. The Referee rejected this contention and asserted that each loan agreement was a separate contract governing the net gains due growers from the sale of loan tobacco for that year. The Referee concluded that for the 1947-1950 crop years a total amount of $319,336.85 in net gains was available for distribution.

The Referee adopted the plan for distribution suggested by the District Court in reversing his earlier order. Under this plan, the court will send notices to all growers requiring all who desire to participate in the distribution to identify themselves, either in person or by satisfactory writing, as the proper persons to receive the funds. However, the formal requirements of the Bankruptcy Act with respect to filing proofs of claims will not be required. The order of the Referee pursuant to the Memorandum Opinion has not yet been entered, and it has not been decided whether the Government will file a Petition for Review of the Referee's order. It is also not known whether the Bankrupt will seek a review of the Referee's order.

# # #

TRANSPORTATION - COOPERATIVE SHIPPING HELD

"CONTRACT" CARRIAGE

(Interstate Commerce Commission v. Shippers Cooperative, Inc. 196 F. Supp. 8 (1961))

In this action by the Interstate Commerce Commission for injunctive relief against a motor carrier and another corporation under the Interstate Commerce Act, the U.S. District Court, held that (1) a nonprofit cooperative association of individual shippers who banded

together to ship products collectively, leasing units of motor carrier equipment which the association operated under its complete control, expense and responsibility was a "contract carrier" requiring certification as such under the Interstate Commerce Act and was neither a "common carrier" nor a "private carrier" under the act; and (2) that the other corporation was participating in the illegal transportation. Accordingly, judgment was entered against both defendants.

The action was brought under 49 U.S.C.A. § 322(b)(Interstate Commerce Act) for injunctive relief against Shippers Cooperative, Inc., a corporation (hereinafter referred to as Shippers) and Pierson-Corn, Inc., a corporation (hereinafter referred to as Pierson-Corn) as defendants, for violations of §§ 303(c), 306(a) and 309(a) of the Interstate Commerce Act. It was alleged that (1) Shippers was engaged in the transportation of property by motor vehicle, in interstate commerce, for compensation, over the public highways, was a motor carrier in interstate commerce, and as such was subject to the Interstate Commerce Act, and (2) Pierson-Corn was engaged in the business of a traffic consulting and advisory service, entered into contracts and agreements with Shippers to manage, supervise, and handle all matters in connection with its motor carrier activities, and was arranging for and participating in said transportation. No permit to engage in such business had been obtained from ICC.

The questions at issue were whether or not the acts performed by defendant, Shippers, were violative of the aforementioned sections of the statute, and as a corollary, whether or not the acts performed by Pierson-Corn constituted participation in any violation of the act. Inasmuch as the facts surrounding the shipment of goods in interstate commerce and the failure to obtain certification were uncontroverted, the dispute resolved itself into a controversy as to whether or not Shippers was a "common", "contract", or "private" carrier, and whether or not Shippers was subject to the certification provisions of the Interstate Commerce Act.

The Court found that Shippers was a non-profit corporation association of individual shippers who had banded together to ship their products collectively in order to save money on shipping costs. The shipper-members gave the property to be shipped to Shippers, but title to the property at all times remained in the individual shippers. Shippers had under lease 18 full units of motor equipment which it operated under its complete control, management, expense and responsibility, including the procuring of cargo and liability insurance. Property was transported in interstate commerce between the Georgia-South Carolina-Tennessee territory and points in California.

Individual shipper-members were assessed, pro rata, on a prepaid trip basis and each shipper contributed money to pay the transportation cost of his own merchandise on the basis of estimate, any necessary adjustments being made at the end of the trip.

Pierson-Corn, under a written contract with Shippers, performed a traffic and consultation service for Shippers, preparing records of the movement of members' merchandise, rendering a bookkeeping service and all other necessary office work on behalf of Shippers and its members. Pierson-Corn was paid $.30 per one hundred pounds of members' merchandise, so obviously derived a profit from this activity.

The court first rejected an argument by Shippers that I.C.C. had failed to exhaust its administrative remedy. It pointed out that questions of statutory interpretation are matters of law, and therefore the so-called "primary jurisdiction doctrine" is not applicable. Civil Aeronautics Board v. Modern Air Transport, 2 Cir., 1950, 179 F. 2d 622, 624 et seq, was cited.

The court proceeded to consider the basic legal question involved.

Under the Interstate Commerce Act a "common carrier" is a person who (1) transports persons or property in interstate commerce, (2) for compensation, and (3) holds itself out to the general public as a performer of such services. A "contract carrier" is a person, other than a common carrier, who (1) transports persons or property in interstate commerce, (2) for compensation, (3) under continuing contracts with a limited number of persons to provide transportation services to such persons. A "private carrier" is a person, not a contract or common carrier, who (1) transports property in interstate commerce, (2) in furtherance of a commercial enterprise, and (3) who is the owner, lessee or bailee of the property transported. The statutory definitions make each category mutually exclusive.

A comparison of the requirements of common carriage with the services performed by defendants in this case resulted in a finding that Shippers was not a "common carrier" within the meaning of the Interstate Commerce Act. However, the Court decided that Shippers was a "contract carrier," and not a "private carrier," on analogy to the decision in Schenley Distillers Corp., et al. v. United States, D. C. Del. 1945, 61 F. Supp. 981, affirmed 1946, 326 U.S. 432, 66 S. Ct. 247, 90 L.Ed. 181.

Since Shippers was a corporation organized to fill the transportation needs of certain other business entities, these entities owned the property transported by Shippers; these entities reimbursed Shippers for the expense of transportation; and Shippers had long-term leases on motor vehicles which it operated under its

sole control and management at its own expense, procuring insurance and maintaining the vehicles and obtaining drivers, the Court could find no material distinction between the instant facts and those involved in the Schenley case.

Accordingly, the Court held that I.C.C. was entitled to an injunction against Shippers and also Pierson-Corn, since it obviously was participating in the illegal transportation.

# # #

TAXATION; STATE DOCUMENTARY STAMP TAX

HELD EXCISE, NOT PROPERTY, TAX

(Choctawhatchee Electric Cooperative, Inc. v. Ray E. Green, Comptroller of the State of Florida. 132 So. 2d 556 (1961))

In denying a petition for review by certiorari, the Supreme Court of Florida held in this case that a State documentary stamp tax on promissory notes was not a property tax but an excise tax, the imposition of which did not constitute an attempt to impose a tax on property belonging to the United States.

The petition for review was from an order of the District Court of Appeals affirming a decree entered by the Circuit Court of Leon County which held that the Choctawhatchee Electric Cooperative, Inc., (hereinafter referred to as the Cooperative) was liable for the payment of the stamp tax on promissory notes executed by it in the State of Florida which were subsequently delivered to and held by the United States as evidence of a loan. (See "Summary of Cooperative Cases", Legal Series No. 16, p. 9, March 1961.)

The promissory notes were secured by real property mortgages on the Cooperative's Florida holdings and supplemental agreements relating thereto. No documentary stamps were attached to the

promissory notes, real property mortgage, and supplemental agreements each of which were issued and executed in the State of Florida.

The essential defense of the Cooperative to the payment of the stamp tax was that no such tax could be imposed by the State of Florida on promissory notes issued to the United State because the documents in question were property of the United States and as such are exempt from all forms of taxation under section 192.06 Florida Statutes, F.S.A. and by virtue of the Constitution of the United States immunizing property of the United States from State taxation.

The Supreme Court of Florida stated that section 201.08, Florida Statutes, F.S.A., which provides for the payment of a documentary stamp on promissory notes, non-negotiable notes, written obligations to pay, etc., was taken largely from the Federal Revenue Act of 1924, as amended. Accordingly, the decisions of the Supreme Court of Florida have followed the Federal decisions with respect to the imposition of the documentary stamp tax. The Court asserted that the District Court of Appeals was in error in holding that the tax was on the transaction and held that it should be construed as being imposed on the document as consistently held by the Federal courts.

However, the Court did not agree with the Cooperative's contention that it was a property tax and it held that it was an excise tax, and that it was not imposed upon the United States. The Court observed that in a previous decision it had held that the tax was on the citizens "promise to pay" and that the liability for payment of the tax devolved upon the Cooperative because of its "promise to pay."

(During the October 1961 term the Cooperative petitioned that a writ of certiorari be issued by the United States Supreme Court to review the decision of the Supreme Court of Florida in this case.)

# # #

TAXATION - ORDINARY and NECESSARY EXPENSES.

(Anaheim Union Water Company, Petitioner, v. Commissioner of Internal Revenue, Respondent
Santa Ana River Development Company v. Commissioner of Internal Revenue, Respondent. (35 T.C. 1072))

In this case the Tax Court found that, although the Anaheim Union Water Company and the Santa Ana River Development Company (nonexempt, nonprofit corporations) sold water or furnished water services only to their shareholders, both corporations received substantial income from sources unrelated to their water business and held that the companies improperly fixed their water charges to their shareholders below cost so that their water and non-water income together would annually approximate their water costs and leave them without profit. The Court upheld the deficiencies determined by the Commissioner and held that to the extent that the water costs were in excess of the charges to the shareholders for such water or water services, the expenses were not deductible as "ordinary and necessary" business expenses under section 162 of the 1954 Code.

The Tax Court also held that where the Santa Ana River Development Company reported the rental income from and expenses paid in connection with land it held as co-tenant with Anaheim and another corporation, such income and expenses should be allocated to each co-tenant in proportion to its ownership in the land.

The Anaheim Union Water Company, hereinafter referred to as Anaheim, is a California nonprofit mutual irrigation corporation which sells and distributes water to its shareholders. Its Articles provide that water was to be supplied "at cost" to its shareholders. The water is utilized by them solely for agricultural purposes. The corporation is taxable (i.e.- not exempt as a mutual irrigation company because of substantial income from sources other than amounts collected from members) and, during the tax years 1952, 1953, and 1954, for which the Commissioner had determined deficiencies in income tax, Anaheim's income fell into three categories: Proceeds from the sale of water, oil royalties, and land rentals and miscellaneous income.

The Santa Ana River Development Company, hereinafter referred to as SARD, is a nonprofit Nevada corporation. It was organized by the Santa Ana Valley Irrigation Company, hereinafter referred to as SAVI, and Anaheim, in order to facilitate the successful operation

of their irregation operations. Its functions were to clear brush and clean and cement channels as well as to drill wells and pump water for the purpose of increasing the flow of water.

SAVI, another irrigation company operating in an area adjacent to that of Anaheim, has the right, as does Anaheim, to withdraw one-half of the surface flow of the Santa Ana River. Of SARD's 28 shares of issued and outstanding stock, Anaheim and SAVI each own 14 shares. SARD has a five-man board of directors, three appointed by SAVI and two by Anaheim. A vote of four directors is required before SARD can take any action other than the payment of bills in the amount of $500 or less.

The rental income and expenses reported by SARD on its 1952 and 1953 Federal income tax returns included amounts which were received from lands in which SARD was a co-tenant with Anaheim and SAVI. In determining the deficiencies for 1952 and 1953, the C Commissioner added to Anaheim's income the rental income attributable to Anaheim's interest in such lands and allowed a deduction to Anaheim for its proportionate share of the related expenses. In 1954, the rental income was properly allocated on the returns filed by SARD, Anaheim, and SAVI, but the expenses were not so allocated; they were all claimed by SARD. The Commissioner allocated to Anaheim its proportionate share of these expenses in determining the deficiencies against Anaheim and SARD for that year.

The Court stated that the record disclosed that Anaheim's directors deliberately fixed the water rates at such level that when the amounts paid by the shareholders for the water were added to the corporation's income from oil and other sources, the sum was such that after supplying the water, no net taxable income remained. In substance the corporation distributed its oil royalties and other income to its shareholders through the medium of charging them less than cost for water. The question, according to the Court, was whether the expenditures in this case, known in advance to be in excess of what the corporation would obtain for the water sold to its shareholders, could fairly be classified as "ordinary and necessary." The Court asserted that exceptional circumstances may exist in other situations that would justify the deduction of somewhat unusual expenses but that no such exceptional circumstances were present in this case. It held that the entire setup was merely a device to distribute the oil and other related income to the shareholders without payment of taxes on such "unrelated taxable income."

The Court referred to the Pomeroy Cooperative Grain Company case, 31 T.C. 674, as constituting an instructive precedent even though not squarely in point. It will be recalled that there the Tax Court had held that income obtained by a nonexempt cooperative

from nonmembers that was otherwise taxable could not in effect be distributed to the members through the medium of patronage dividends so as to render it tax free. The Court declared that it was no more appropriate to bury Anaheim's non-shareholder income for tax purposes in its designedly insufficient water rates than to allow non-patronage income to be covered by Pomeroy's so-called patronage dividends. (This specific holding in the Pomeroy case was later affirmed on appeal, although another aspect of the case was reversed. See 288 F. 2d 326; and Legal Series No. 17, "Summary of Cooperative Cases," June 1961, p. 17).

The Court also stated that the issue in SARD's case was similar since it appeared from the record that SARD charged its shareholders, Anaheim and SAVI, less than cost for the water services it furnished them during the tax years in question because it, too, applied non-shareholder income to the payment of its expenses.

As to whether the rental income in 1952 and 1953 and rental expenses in 1952, 1953, and 1954 reported by SARD should have been allocated to Anaheim as co-tenant as determined by the Commissioner, the Court held that SARD, Anaheim, and SAVI were each separate corporate entities and that the aggregate rental income derived from these properties should have been allocated together with the corresponding rental expenses to each of the three corporations and so reported by them.

Four of the Tax Court judges dissented from the majority decision on the grounds that the only issue before the Court was the deductibility of expenses and that it is wrong to deny that otherwise legitimate expenses are not such to the extent they exceed amounts charged shareholders, simply because of the source of the funds used to pay such expenses. The dissenters said: "We need not pass upon or evaluate theories not advanced by the parties or abandoned on brief, such as increasing the petitioner's gross receipts by the amount of the water costs not charged to shareholders or the possibility that constructive dividends were paid."

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MARKETING CONTRACTS - INDUCEMENT TO BREACH

(Carolina Milk Producers Association Cooperative, Inc., v. Melville Dairy, Inc. 120 S.E. 2d 548)

This case was heard on appeal from a decision of the Guilford Supreme Court (See Legal Series No. 17, p. 33, "Summary of Cooperative Cases") which held that Melville Dairy, Inc., the defendant milk distributor, had knowingly induced members of the plaintiff, Carolina Milk Producers Association Cooperative, Inc., to breach their contracts with the Cooperative.

Prior to 1957 the Cooperative had notified Melville of the persons who were its members and had executed milk marketing agreements or contracts with the Cooperative. Melville continuously recognized these contracts as valid and enforceable marketing contracts. These contracts provided for a deduction of 6 cents per hundredweight of milk delivered as Cooperative dues. They authorized the purchaser to pay the members for the milk sold but they also authorized the Cooperative to collect the purchase price in its own name for all milk owned or controlled by its members. After the Cooperative certified the membership contract to Melville, Melville checked with the members and upon their approval deducted the monthly dues which it transmitted to the Cooperative.

In 1957 Melville contemplated a 10 cents per hundredweight increase in its hauling charges. The Cooperative undertook to have Melville revoke and rescind the increase and brought the matter to the attention of the North Carolina Milk Commission. Subsequently the proposed increase was cancelled.

As an aftermath of the proposed increase, the Cooperative sought to have its producers install refrigeration so that, by the purchase of tank trucks, it could take over all the hauling of milk. Many producers objected to the transfer to tank operation because it would require each of them to make an outlay of from $1,800 to $2,300 for the change-over. Producers began notifying Melville that they no longer desired to have their dues deducted from the sale price of their milk. In October 1957 an official of the North Carolina Milk Commission advised the Cooperative that he had been informed by several distributors that they had received written notice from certain producers to discontinue the deductions. This official later testified as witness that he had advised the president of Melville that he "should make the dues deduction, or rather that he should have something in writing from the producers before he stopped making these deductions."

In view of these developments, in December 1957, Melville delivered to all producers, including the above-mentioned thirty-nine members of the Cooperative, a mimeographed letter inquiring as to whether or not they desired the practice of deducting dues to be discontinued, and if so to sign a statement to that effect. In January 1958 Melville stopped deducting the dues and when the Cooperative learned of this action it advised Melville to remit not only the dues but the entire amount of the proceeds received by Melville from the sale of its members' milk, as authorized by the Cooperative's marketing agreement with its members.

In April 1958 Melville advised most of the cooperative's members attending a meeting to sign slips that had been prepared for the signatures of those members who desired that payments for their milk be made directly to the Cooperative. Only three members signed and one later repudiated signing the slip. Thereafter Melville remitted to the Cooperative the total proceeds received by Melville from the sale of the milk of those two members only.

The Superior Court had ruled that the evidence disclosed that by its conduct Melville knowingly induced the Cooperative's members to breach their contracts with the Cooperative and that Melville was liable to the Cooperative in the penal sum of $500 for each of the thirty-nine members involved.

The Supreme Court of North Carolina reversed this decision and held that after Melville learned that some of the Cooperative's members no longer wanted their dues collected it was merely trying to protect itself when it requested these members to notify it whether or not they desired the practice of deducting the dues to be discontinued. The Court asserted that neither Melville nor any other dairy was a party to the marketing contracts, that the collection of the dues by Melville had been voluntarily assumed, and that Melville had not relied on the contracts but obtained the personal approval of each producer before it actually began the deduction of dues. The Court concluded that when Melville learned that some producers no longer desired the deduction of the dues its subsequent conduct did not exceed the bounds of business propriety and legitimate self-interest.

The Supreme Court thus held that Melville was not liable in any penal amount nor for the amount of the dues which it had refused to remit to the Cooperative. On the latter issue the Court pointed out that a "third party cannot be held for a payment without a finding that the party primarily liable has failed to meet the obligation. The

Court did find that Melville had not paid the dues but there is no finding the producer did not pay them. The court's judgment requires Melville to pay the dues after having paid in full for the milk. The judgment permits the producer to escape payment, or, if he has paid, then it permits the Association to collect twice; once from the member and once from Melville."

The Court considered either result would be incorrect.

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